RECEIVED
JUN 9 1978
OFFICE OF THE CLERK
SUPREME COURT, U.S.

77-6885

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 78-

VIRGIL DELANO PRESNELL, JR.,

Petitioner

-v-

STATE OF GEORGIA,

Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

J. MILTON GRUBBS
P. O. BOX 1149
271 ROSWELL STREET
MARIETTA, GEORGIA, 30061

ADELE P. GRUBBS
P. O. BOX 1149
271 ROSWELL STREET
MARIETTA, GEORGIA, 30061

WILLIAM P. HOLLEY
223 WASHINGTON AVENUE, S. E.
MARIETTA, GEORGIA, 30060

ATTORNEYS FOR PETITIONER

RECEIVED
JUN 9 1978
OFFICE OF THE CLERK
SUPREME COURT, U.S.

77-6885

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 78-

VIRGIL DELANO PRESNELL, JR.,)
Petitioner)
VS.)
THE STATE OF GEORGIA,)
Respondent)
)

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

Petitioner respectfully prays that this Court issue its writ of certiorari to review the judgment of the Supreme Court of the State of Georgia entered in this case on March 7, 1978, on which rehearing was denied on March 28, 1978.

A. CITATION TO OPINION BELOW

This case is cited at 241 Georgia Supreme Court 49. A copy of the opinion and its addition on denial of rehearing are set out as Appendix A hereto.

B. JURISDICTION

The judgment of the Supreme Court of the State of Georgia was entered on March 7, 1978, and the rehearing was denied on March 28, 1978. These opinions are attached as Appendix A.

Jurisdiction of this Court is invoked under 28 U. S. C. §1257(3), the Petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

C. QUESTIONS FOR REVIEW

The Petitioner raises the five following questions for review by this Court.

1. Was the Trial Court correct in ordering, on motion by the State of Georgia, a full and complete psychiatric examination of the Petitioner, over Petitioner's objection? Further was the Trial Court correct in allowing the State of Georgia in its case in chief, to present evidence arising out of the Court ordered psychiatric examination that the Petitioner was sane at the time of the commission of these offenses? The Petitioner did not present any psychiatric evidence at the guilt or innocence part of the bifurcated trial. Was this action by the Trial Court a violation of the Petitioner's 4th, 5th and 14th amendment constitutional rights?

2. The Petitioner was indicted and convicted of kidnapping with bodily injury, said bodily injury being aggravated sodomy. The Petitioner was also indicted and convicted of forcible rape. The Supreme Court of Georgia held that the conviction for forcible rape was one for statutory rape and affirmed a conviction for statutory rape.

The Supreme Court of Georgia also held that the aggravated sodomy, under the facts of this case, was not bodily injury. However, the Supreme Court of Georgia affirmed the Petitioner's conviction for kidnapping with bodily injury, holding that the allegation of force used in the rape was sufficient bodily injury. Further, the Supreme Court of Georgia affirmed the Petitioner's sentence of death for malice murder aggravated by kidnapping with bodily injury, again using the allegation of force from the rape as bodily injury, although the notice of aggravating circumstances served on the Petitioner, which is required by Georgia Law, said the malice murder was aggravated by kidnapping with bodily injury, being aggravated sodomy. There was only one act of penetration and no other injury to the victim against whom the Petitioner was charged with kidnapping with bodily injury. There were two victims in this case. Was this ruling by the Supreme Court of Georgia, a violation of the Petitioner's 5th, 6th and 14th amendment constitutional rights?

3. Did the Supreme Court of Georgia deny the Petitioner's 5th and 14th amendment constitutional rights, by affirming the Petitioner's convictions for malice murder and kidnapping with bodily injury after the State of Georgia, in its brief to the Supreme Court of Georgia, conceded and admitted that the Petitioner's convictions for these two offenses should be reversed and that the Petitioner should have

been acquitted as to malice murder and kidnapping with bodily injury?

4. Did the totality of the circumstances under which the alleged statements and confession of the Petitioner were made, including the promises by the officer to tell the judge of Petitioner's cooperation as well as the other promises that were made, render the alleged statements and confession involuntary, being in violation of the Petitioner's 5th and 14th amendment constitutional rights, and therefore make the alleged statements and confession inadmissible.

5. Is the death sentence in Georgia violative of the 5th, 8th and 14th amendments to the Constitution of the United States?

D. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the 4th, 5th, 6th, 8th and 14th Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the Law of the State of Georgia:

i) Georgia Laws 1968, pp 1249, 1276 being codified in Georgia Code Section 26-1101:

> "Murder (a). . . A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate

intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

"(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.

"(c) A person convicted of murder shall be pnished by death or by imprisonment for life."

ii) Georgia Laws 1968, pp 1249, 1299 being codified in Georgia Code Section 26-2001:

"Rape - A person commits rape when he has carnal knowledge of a female, forcibly and against her will. Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex organ. A person covicted of rape shall be punished by death or by imprisonment for life, or by imprisonment for not less than one nor more than 20 years. No conviction shall be had for rape on the unsupported testimony of the female."

iii) Georgia Laws 1968, pp 1249, 1302 being codified in Georgia Code Section 26-2018:

"Statutory Rape - A person commits statutory rape when he engages in sexual intercourse with any

female under the age of 14 years, not his spouse: Provided, that no conviction shall be had for this offense on the unsupported testimony of the female. A person convicted of statutory rape shall be punished by imprisonment for not less than one nor more than 20 years."

iv) Georgia Laws 1968, pp 1249, 1282 being codified in Georgia Code Section 26-1311:

"Kidnapping - (a) A person commits kidnapping when he abducts or steals away any person without lawful authority or warrant and holds such person against his will.

"(b) A person over the age of 17 commits kidnapping when he forcibly, maliciously, or fraudulently leads, takes, or carries away, or decoys or entices away, any child under the age of 16 years against the will of the child's parents or other person having lawful custody.

A person convicted of kidnapping shall be punished by imprisonment for not less than one nor more than 20 years: Provided that a person convicted of kidnapping for ransom shall be punished by life imprisonment or by death; and Provided, further, that if the person kidnapped shall have received bodily injury, the person

convicted shall be punished by life imprisonment or by death."

v) Georgia Laws 1968, pp 1249, 1335, 1969, p 809 and 1973, pp 159, 170, being codified in Georgia Code Section 26-3102:

"Capital Offenses; jury verdict and sentence.

"Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking. The provisions of this

section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty."

vi) Georgia Laws 1924, pp 195, 197 and 1937-38 Extras Session, p 330, being codified in Georgia Code Section 27-2512:

"Electrocution substituted for hanging; place of execution -

"All persons who shall be convicted of a capital crime and who shall have imposed upon them the sentence of death, shall suffer such punishment by electrocution instead of by hanging.

In all cases in which the Defendant is sentenced to be electrocuted it shall be the duty of the trial judge, in passing sentence, to direct that the defendant be delivered to the Director of Corrections for electrocution at such penal institution as may be designated by said Director. However, no executions shall be held at the old prison farm in Baldwin County."

vii) Georgia Laws 1924, p 195 and 1973, pp 159, 171, being codified in Georgia Code Section 27-2514:

"Sentence of Death; copy for penitentiary superintendent. Time and mode of conveying prisoner to penitentiary. Expenses.

"Upon a verdict or judgment of death made by a

jury or a judge, it shall be the duty of the presiding judge to sentence such convicted person to death and to make such sentence in writing, which shall be filed with the papers in the case against such convicted person, and a certified copy thereof shall be sent by the clerk of the court in which said sentence is pronounced to the superintendent of the State penitentiary, not less than 10 days prior to the time fixed in the sentence of the court for the execution of the same; and in all cases it shall be the duty of the sheriff of the county in which such convicted person is so sentenced, together with one deputy or more, if in his judgment it is necessary, and provided that in all cases the number of guards shall be approved by the trial judge, or if he is not available, by the ordinary of said county in which such prisoner is sentenced, to convey such convicted person to said penitentiary, not more than 20 days nor less than two days prior to the time fixed in the judgment for the execution of such condemned person, unless otherwise directed by the Governor, or unless a stay of execution has been caused by appeal, granting of a new trial, or other order of a court of competent jurisdiction, and the expense for transporting of said person to

the penitentiary for the purpose of electrocution shall be paid by the ordinary of the county wherein the conviction was had, or the board of county commissioners, the county commissioner, or other person or persons having charge of the county funds, out of any funds on hand in the treasury of such county."

viii) Georgia Laws 1973, pp 159, 163 being codified as Georgia Code Section 27-2534.1:

"Mitigating and aggravating circumstances; death penalty.

"(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

"(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence.

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a sub-

stantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it

involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement of himself or another.

"(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the

statutory aggravating circumstances numerated in section 27.2534.1(b) is so found, the death penalty shall not be imposed.

ix) Georgia Laws 1973, pp 159, 165 being codified as Georgia Code Section 27-2537:

"Review of death sentences. (a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within 10 days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

"(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

"(c) With regard to the sentence, the court shall

determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 27-2534.1(b), and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

"(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

"(e) The Court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based

on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of Georgia in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

"(f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

"(g) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

"(h) The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes.

(i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence.

E. STATEMENT OF THE CASE

The Petitioner, Virgil Delano Presnell, Jr., was indicted and convicted by a jury of malice murder and kidnapping of Lori Ann Smith, aged 8 years and the forcible rape and kidnapping with bodily injury, being aggravated sodomy of Andrea Furlong, aged 10 years. Sentences of death were imposed by the jury and trial judge for malice murder, rape and kidnapping with bodily injury, being aggravated sodomy, and Petitioner received 20 years for kidnapping.

In its judgment, on appeal of the case, the Supreme Court of Georgia affirmed the death sentence for malice murder, reversed the conviction and death sentence for rape, reducing it to statutory rape, and reversed the death sentence for kidnapping with bodily injury, but affirmed the conviction therefor, finding the bodily injury not to be aggravated sodomy but the alleged force in the rape.

Petitioner asks this Court to issue its writ of certiorari to correct the judgment of the Supreme Court of Georgia.

The facts developed at trial and at the various hearings in these matters showed that the Petitioner read a considerable amount of pornographic literature, (S Exhibits 21, 22 and 23) and attended Adult Movie Theatres in Atlanta, (T-488, 284), all concerning young girls. The Petitioner liked to look at small girls and play with himself. (T-496). The day prior to the occurrences, the Petitioner had watched Andrea Furlong on her way home from school and wanted to be with her, because she reminded him of a girl in one of his books. (T-505). On May 4, 1976, he waited on Andrea Furlong, but when she came by with Lori Ann Smith, whom he thought was a boy, he almost did not do anything. (T-509). When they had just passed him, he grabbed them both and made a threat. (T-351). He tied them up and taped their mouths for a few minutes and then undid everything and put them in his car. (T-353). In the car, Andrea Furlong placed her mouth over the Petitioner's private part at his request. (T-354).

They all then stopped at a service station and the Petitioner hoped the girls would leave. (T-515). He then took them to the woods where they all undressed, and after applying vaseline to himself, the Petitioner penetrated Andrea Furlong one time. (T-355,356,371).

The Petitioner left with Lori Ann Smith (T-357) whom he had not touched. Lori ran and the Petitioner ran after her. Lori fell in the creek and the Petitioner fell on top of her with her head at his waist. (T-523 and 524). The Petitioner tried to get up and lifted Lori on to the bank where she was gasping. He pressed on her chest several times. (T-525).

The Petitioner then came back to Andrea Furlong who testified his pants were wet. (T-357). The Petitioner committed sodomy with Andrea Furlong again and they walked to the car where he put her in the trunk. (T-358). Petitioner went to his mother's house and changed clothes and got his mother's gun. (T-528). The Petitioner's idea was to return Andrea home and then kill himself. (T-528). The car had a flat tire and he stopped at a Church and let Andrea Furlong out; that was the first time Andrea saw a gun and she testified that the Petitioner never pointed a gun at her. (T-360 and 374).

The testimony at trial showed that the only blood at the scene was that of Andrea Furlong, where she had bled from the vagina as a result of the one penetration by the Petitioner. (T-333 and 435). No one saw any other marks on Andrea Furlong at all (T-206,383), including her doctor.

The medical examiner who conducted the autopsy on Lori Ann Smith, who was Dr. Joseph L. Burton, stated that

her bruises were located as if she fell. (T-399). The cause of death was drowning, which could have occurred in a matter of seconds or a couple of minutes. Although there were some superficial marks at the back of the neck, manual strangulation was not a contributory factor to death. (T-310-11). The medical examiner further testified that his findings were consistent with the Petitioner's version of the occurrence and that they were consistent with an accident. There was no sexual trauma to Lori Ann Smith. (T-317). He further testified that Lori Ann could have died on the bank of the creek.

The Petitioner was arrested as he was changing his tire to his car, by Det. Williams and Lt. Moss. He was told that the Detectives had a girl who could identify him in a lineup (T-423) and that they needed to find a girl missing in the woods. (T-11 of June 10, 1976 transcript). At first, the Petitioner said that he knew nothing about it. The Detectives rode around with the Petitioner to the gas station where he had bought the tire for the car. Finally, the Petitioner said he would show the officers where he left Lori Ann. (T-393). The Petitioner said the reason he decided to help was because Detective Williams said he would tell the judge that the Defendant showed the Detectives where everything occurred. (T-39 of June 10, 1976; T-423). Detective Williams agreed that he said he would tell the judge and that he told the Petitioner that it would weigh heavy with the court and the judge. (T-392, 436).

After this conversation, the Petitioner and the Detectives went to the site of the occurrence where the Petitioner was advised that he was under arrest and was handcuffed. (T-394). The Petitioner pointed out various evidence and pointed to where he left the girl Lori Ann. (T-395). Detective Williams told the Petitioner that if the Petitioner was telling the truth, Lori Ann would have run out by now, to which the Petitioner said she might be hurt. Lori Ann Smith's body was found on the bank of the creek.

At 9:30 P. M., on the same day, the Petitioner was in the Cobb County Police Station, where he was given his Miranda warnings and Detective Williams and Lt. Moss took a statement from him. (T-405). The Petitioner was handcuffed throughout the statement and one of the handcuffs was too tight and had to be loosened. (T-407).

During the course of this statement, Det. Williams told the Petitioner he would help him along (T-406), the Petitioner was told to level with them as they had been through it all before (T-409) and that they were not going to get mad and raise hell and that they would not jump up and slap and beat the Petitioner around. (T-412). At T-314, the suspect said:

> "Well, it is just in the past, they promised me one thing and then I gave them the information they wanted and then, you

know, they didn't keep their half of it", to which Det. Williams said -

"Well, I've promised you a one-man cell have I not?"

Further, Det. Williams told the Defendant - "get it off your chest you will feel better" (T-416) and when the Petitioner would not answer a question the Detective said, "Tell us all Virgil, we are almost there, partner, just tell us the whole thing". The Detectives further promised the Petitioner a psychiatrist. (T-37, June 10, 1976).

William Dan West, an Auxiliary Police Officer of the City of Smyrna said that Det. Williams told him that the Petitioner was going to show him where the dead girl was and that Det. Williams knew the girl Lori Ann was dead before the Petitioner showed him where she was. (T-214-220).

The psychiatrist from Central State gave evidence in the sentencing portion of the bifurcated trial based on Petitioner's statements to him at Central State, which is a special issue in this case, that pedophilia is a mental disorder and that a pedophiliac cannot control his desires. (T-469). The doctor found Virgil passive but did not investigate him for pedophilia. (T-476).

The Petitioner testified that he did not intend to hurt either girl (T-527) and that he did not realize rape,

kidnapping and sodomy as exhibited in this case were wrong.

The Petitioner was accused of committing these offenses on May 4, 1976. Counsel for the Petitioner were appointed on May 7, 1976, and appearance of counsel and demand for witnesses was made. (R-6). On the same date, the State made a motion for a psychiatric examination of the Petitioner on the ground that the issue of sanity was expected to be raised at trial. (R-8).

A hearing was held on May 18, 1976, at which the Petitioner objected to such an examination and the issue was continued by the Court. (R-12). The Petitioner raised the issue of his constitutional rights to remain silent and not be forced to make incriminatory statements, and these were formalized in a Motion in Opposition to the Prosecution's Motion. (R-14).

A revocation of any waiver of rights Petitioner might have made was filed on June 8, 1976. (R-29). Various motions for a commitment hearing in camera because of publicity and waiver of presence of the Petitioner were filed. (R-30). An order granting these motions was entered on June 8, 1976 (R-36), and the record was sealed.

On June 17, 1976, the Trial Court ordered the Petitioner to undergo a psychiatric examination. (R-48). The order recited that questions had been raised as to the Petitioner's ability to stand trial as well as his responsibility

for the acts, and that the State had the burden of proof on the issue of insanity. Further, the Court ordered the report furnished to the State, counsel for the Petitioner and the Court. (R-49). The Order was amended to order the Sheriff of Cobb County to take the Petitioner to Central State Hospital in Milledgeville for a full and complete psyhicatric examination. (R-51).

On July 1, 1976, the first indictment against Petitioner being nolle prosequied, the Petitioner was reindicted under Indictment No. 76-0603 on which indictment the Petitioner was tried on Counts 1, 2, 3 and 5. (R-54). A new Notice of Aggravating Circumstances was filed on the new indictment and subsequently at trial, Paragraphs 2, 4 and 7 only were submitted to the jury. (R-59). The Petitioner again waived arraignment and pled not guilty. (R-64).

A motion to suppress the statements and two written confessions of the Petitioner was made on the grounds that they were induced by promises, threats and coercion and therefore, were suppressible as being in violation of the Constitutional rights of the accused. (R-70).

The Petitioner filed a motion attacking both the indictment and the notice of aggravating circumstances. (R-74). The issues raised against the indictment were conceded by the State (R-79, R-103) and all the issues raised against the Notice of Aggravating Circumstances were also conceded by the

State except the constitutionality of the death sentence and whether the murder could be aggravated by the kidnapping with bodily injury, the same kidnapping with bodily injury could be aggravated by the rape, and the same rape could be aggravated by the same murder. (R-74; R-102). The other question remaining was whether a capital offense against one person could be aggravated by a capital offense against another person. (R-74).

On the 11th of August, 1976, the Trial Court issued an Order granting the Petitioner's Motion to Suppress as to the second confession which is not at issue here, and denying the Petitioner's Motion to Suppress the Petitioner's initial statements and his first confession which are in issue here. (R-89). One of the determinations made by the Trial Judge in his Order, was that the Petitioner was sane according to the report the Judge received from Central State pursuant to his own Order and this was used to uphold the Court's position that the statements were freely and voluntarily made. (R-93). The Trial Judge further found that the testimony of the Detective was uncontradicted in regard to his not knowing that Lori Ann Smith was dead (R-95), which was not so at Trial, as that testimony was contradicted. (T-214 and 220).

The State filed a withdrawal of certain aggravating circumstances and one Count of the indictment. (R-102 and 103). The Trial Court then ruled that the grounds of the Petitioner's

Motion to Quash the Notice of Aggravating Circumstances not conceded by the State were overruled. (R-106).

The case was tried before Judge Luther Hames, Jr., and a jury on August 23, 24, 25 and 26, 1976.

During the initial presentation of the State's case at trial, Dr. Carl Smith, a psychiatrist, was allowed to testify that the Petitioner had spent eight days of examination and evaluation at Milledgeville State Mental Hospital and that he had seen him for two hours. (T-450). Based on the record of all the evaluations at Milledgeville and his own conversations with the Petitioner, Dr. Smith was allowed to give his opinion that the Petitioner was sane. (T-453-454). The Petitioner objected that opinions based on illegally and unconstitutionally obtained statements would be also inadmissible. (R-454). The Petitioner tendered no psychiatric evidence as to his sanity on the guilt or innocence portion of the Trial and the State was allowed to put in evidence as to sanity on direct evidence in its case in chief. The Petitioner was not given his constitutional rights to remain silent and have his attorney present prior to his examination by the psychiatrist.

The problems became even more complex on cross-examination by the Petitioner's counsel. The Trial Court had taken the position that Dr. Carl Smith could give his opinions based on the entire record from Milledgeville,

including other examiners. However, the Trial Court would not allow the Petitioner's counsel to go into findings as to sub-headings of sanity including personality disorders, and neurosis which were a material part of a blanket finding of sanity, without letting the entire conversations in and ruling that the Petitioner had waived all its objections. (R-461,462).

Further, the Trial Court ruled that the Petitioner could not go into the findings of the members of the psychiatric team even though the Doctor's testimony was admittedly based on them. (T-464).

During his charge to the jury, the Trial Court charged only on Statutory Rape using the language that force was immaterial. (T-640). On kidnapping with bodily injury, the Court charged that any crime committed against a person constituted bodily harm sufficient to increase kidnapping to kidnapping with bodily injury. (T-642).

The jury found the Petitioner guilty on all counts, (R-157) and the sentencing phase of the trial was undertaken. Written specifications of aggravating conditions were submitted to the jury but the Trial Court did not charge on the specifications of mitigating circumstances. The jury came back for a recharge and the Trial Court gave only instructions in regard to the death sentence and none as to the giving of a life sentence. (T-701).

The jury found three concurrent death sentences. (R-157).

The Trial Court sentenced the Petitioner to twenty years consecutive for the kidnapping of Lori Ann Smith (T-712) which was changed to concurrent time in the formal sentence. (R-158).

The Trial Court entered a formal Order of death sentence on August 26, 1976. (R-160).

On appeal to the Supreme Court of Georgia, the State of Georgia in its Appellee's brief conceded that the conviction of the Petitioner for kidnapping with bodily injury should be stricken and the conviction for malice murder should be one for felony murder, and so moved the Court in the conclusion of its Brief. See Appendix B, Page 81.

However, the Supreme Court of Georgia affirmed the Petitioner's conviction for malice murder and kidnapping with bodily injury. See Appendix A, Page 27.

The Supreme Court also affirmed the psychiatric examination as ordered and used in testimony in this case.

In regard to the rape and kidnapping with bodily injury the Court held:

> "1. The only evidence of bodily injury, to support the crime of the kidnapping with bodily injury of the older child, is the bodily injury which resulted from the rape of that child. Thus, the

convictions for both kidnapping with bodily injury and forcible rape cannot be upheld. State v. Estevez, 232 Ga. 316 (1) (206 SE2d 475) (1974). Because the jury was instructed as to statutory rape as well as forcible rape but was not instructed to show by their verdict which offense was found, the latter conviction cannot be upheld. Drake vs. State, 239 Ga. 232 (1) (236 SE2d 748) (1977); Reed vs. State, 238 Ga. 457 (7) (233 SE2d 369) (1977).

The death penalty for rape therefore is vacated. Compare Coker v. Georgia, U. S. (SC , LE2d) (19). On remand, the court below is directed to enter sentence for the crime of statutory rape, not less than one nor more than 20 years. Code Ann. § 26-2018.

As a consequence of the foregoing, there is evidence of bodily injury, not a part of the crime of statutory rape, to support the crime of kidnapping with bodily injury.

The evidence supports convictions for the murder and kidnapping of the younger child and kidnapping with bodily injury and statutory rape of the older girl. The State's erroneous identification of the creek where the murder

occurred, called Nickajack Creek in the indictment, is not a fatal variance. Dobbs v. State, 235 Ga. 800 (221 SE2d 576) (1976). The state's attempted reliance upon sodomy as constituting the bodily injury associated with the kidnapping of the older child is not ground for retrial."

F. HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. The constitutional questions regarding the psychiatric examination of the Petitioner were raised, prior to indictment, by the Petitioner filing a motion in opposition to the State's motion for psychiatric examination. See Appendix B, R-14, R-8. The Order and amendment thereto requiring a full psychiatric examination of the accused are in Appendix B, R-48, R-51. Further, the Petitioner objected to the evidence of the psychiatrist Dr. Smith when he was called to the stand in the State's case in chief - See Appendix B, P-447-476. This issue was raised by the Petitioner in the Supreme Court of Georgia and on motion for rehearing before that Court, but the Supreme Court affirmed. See Appendix A.

2. The Supreme Court of Georgia in its opinion in this case - See Appendix A - change the charges against the Petitioner and found that although the Petitioner had been indicted by the grand jury for kidnapping with bodily injury,

being aggravated sodomy, he was not guilty of that charge, but as the conviction for forcible rape was reduced to statutory rape, he was guilty of kidnapping with bodily injury being the alleged force used in the rape as well as statutory rape. Further, the notice of aggravating circumstances given the Petitioner stated the murder was aggravated by kidnapping with bodily injury - aggravated sodomy - (Appendix B, R 24), however the Supreme Court changed this statutory notice and affirmed the death sentence for malice murder aggravated by kidnapping with bodily injury being the alleged force used in the rape. These serious constitutional violations having first been made by the Supreme Court of Georgia in its decision of March 7, 1978, the Petitioner raised these constitutional questions in its motion for rehearing - See Appendix B, P. 82, which was denied with a short ruling - See Appendix A - denial of motion for rehearing.

3. The judicial admissions made by the State that the Petitioner could not be convicted of kidnapping with bodily injury or malice murder were first made in the Supreme Court of Georgia and the Supreme Court of Georgia violated the Petitioner's constitutional rights by not following these admissions. The Petitioner first raised this question in the motion for rehearing - See Appendix B, P. 82, which was denied.

4. A timely motion to suppress the Petitioner's

alleged statements, acts and confessions was made by the Petitioner - see Appendix B, R 23 , and the Trial Court held a Jackson v. Denno hearing prior to the trial and ruled out one confession but allowed in the remainder. See Appendix B, R

The Petitioner raised this issue in the Supreme Court of Georgia who ruled only as to the written confession stated:

"4. The defendant contends that the trial court erred by refusing to suppress a confession by the defendant. The confession was made on the evening of the crimes while the defendant was in the custody of police officers and was taped on a dictaphone. In it the defendant acknowledged understanding the police officer's earlier explanation of his constitutional rights prior to any discussion of the crimes. Prior to making the recorded confession, he signed a complete waiver. Miranda v. Arizona, 384 U. S. 436 (86 SC 1602, 16 LE2d 694) (1966). He signed the transcription and initialed each page. The confession, which also contained a complete waiver, was read before the jury.

The defendant contends that a promise of police officers to tell the judge of his aid in locating the missing younger girl, a promise of a one man cell, and a promise to seek a psychiatric examination, were such inducements

as to compel the defendant to be a witness against himself. After an evidentiary hearing the trial court found the defendant was twenty-two years old, sane at the time of the confession and likely to have been familiar with police procedures. The court found no evidence of mistreatment and that the interrogation was not intensive. The defendant was with interrogating police officers from about six-thirty in the evening, when the detectives found him at his mother's home, until about nine forty-five, when the taped confession was begun. In this time he was questioned at home, transported at his direction to a filling station where he had obtained a tire, transported at his direction to the scene of the crime, held while the scene was investigated and the body of the younger child was located and transported to the police station. The trial court's finding that the defendant was not compelled to be a witness against himself is amply supported by the evidence. Hurt v. State, 239 Ga. 665 (2) (SE2d) (1977); Lego vs. Twomey, 404 U. S. 477 (92 SC 477, 30 Le2d 618) (1972).

5. Defendant contends that under Code Ann. §38-411 his confession was not voluntary because it was induced by "hope of benefit." Pursuant to Code Ann.

§38-412 a confession made on promise of "collateral benefit" is not inadmissible. We find that a hope of lighter punishment (induced by one other than the defendant) is usually the "hope of benefit" to which Code Ann. §38-411 refers, Turner v. State, 203 Ga. 770 (1) (2) (48 SE2d 522) (19); King vs. State, 155 Ga. 707, 715 (118 SE 368 (1923), and that agreeing to the defendant's request to put him in a cell by himself, to seek a psychiatric examination, and to tell the judge of his cooperation, did not constitute the kind of "hope of benefit" which is contemplated by Code Ann. §38-411. The trial court did not err in overruling the motion to suppress or in admitting the confession. Person vs. State, 235 Ga. 814 (2) (221 SE2d 587) (1976); Hurt vs. State, supra. See also Mitchell vs. State, 239 Ga. 456 (SE2d) (1977)."

The issue was again raised on motion for rehearing but was denied.

5. The question of the constitutionality of the death sentence was raised in the trial court before Trial - See Appendix B, R-38 - and was raised in the Supreme Court of Georgia on the appeal and on the motion for rehearing -

see Appendix B, P . The Supreme Court of Georgia did not rule on this issue even though it was raised and they were specifically requested to in the motion for rehearing.

G. ARGUMENT AND CITATION OF AUTHORITY

1. Is it a violation of a defendant's 5th Amendment Constitutional rights for a State Court to Order a Defendant to submit to a psychiatric examination to determine the Defendant's sanity at the time of the commission of the offenses? This having been done, is it a further violation of the Defendant's constitutional rights to allow one of the examining psychiatrists to testify during the prosecution case in chief as to the Defendant's sanity at the time of the commission of the offenses?

The Supreme Court of Georgia, in a case of first impression, has held in its opinion in this case, See Apendix A, that there is no violation of a defendant's constitutional rights for the Trial Court to order a defendant to submit to a psychiatric examination to determine the Defendant's sanity at the time of the alleged offenses. There is no statute in Georgia authorizing such an examination. It is submitted that this decision opens to the prosecution in Georgia, a door formerly closed and protected by the 5th

Amendment to the U. S. Constitution, and is an issue that this Court should earnestly consider as it is not in accordance with the decisions of this Court.

The 5th Amendment to the U. S. Constitution states that no person shall be compelled in any criminal case to be a witness against himself. Obviously, in order to conduct a psychiatric examination of a person, that person must speak, and speak about himself. Not only must he make sounds, but he must give statements and opinions about his inner thought processes, and this the Defendant did in this case, over his objection. This clearly violated his constitutional right to remain silent and not incriminate himself.

In this case the Trial Court, in response to a Motion by the State (Prosecution), ordered the Defendant to submit to a full psychiatric examination. Appendix B, Pages 14-17 which included a determination of the Defendant's sanity at the time of the commission of these offenses. The Supreme Court of Georgia held, in affirming this order, that such an examination was like a voice identification, lineup or fingernail scraping procedure and did not force the Defendant to be a witness against himself.

This is clearly contrary to this Court's rulings in this matter, particularly in Schmerber vs. State of California, 384 U. S. 757. In that case this Court discussed the self-incrimination privilege at length and said:

"Privileges against self-incrimination protects an accused only from being compelled to testify against himself or from otherwise providing the State with evidence of a testimonial or communicative nature."

"Protection of privilege against self-incrimination reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications."

"To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on a basis of physiological responses, whether willed or not, violates the privilege against self-incrimination."

In the present case the Supreme Court of Georgia has established as the law of Georgia a system whereby a Defendant may be compelled to undergo extensive psychological testing, over a period of days, in which responses are required from him, in an effort to determine his innocence or guilt, that being his sanity or insanity at the time of committing the alleged acts. This clearly and absolutely violates the Defendant's privilege against self-incrimination. It is not a simple lineup, or a blood test - in which physical items are involved, nor even a voice identification where a Defendant is required to speak certain words. In a voice identification a Defendant is not required to give opinions, facts or feelings concerning anything, the only issue is

whether the voice is the same, not the contents of the Defendant's mind. Under the present case, Georgia now requires the Defendant to expose the inner workings of his mind and this clearly violates his right to remain silent and not incriminate himself.

Schmerber vs. State of California, 384 U. S. 757 went on to say:

> "History and a long line of authorities in lower courts have consistently limited its (5th Amendment) protection to situations in which the State seeks to submerge those values by obtaining the evidence against an accused through the cruel, simple expedient of compelling it from his own mouth - - - In sum, the privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will'."
>
> "It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers. Boyd vs. U. S., 116 U. S. 616. - - - On the other hand, both Federal and State Courts have usually held that it offers no protection

against compulsion to submit to fingerprinting, photographing or measurements, to write or speak for identification, to appear in Court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling "communications" or "testimony" but that compulsion which makes a suspect or accused the source of "real or physical evidence does not violate it."

> "Some tests, seemingly directed to obtain physical evidence, for example, lie detector tests measuring changes in body function during interrogation, may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of physiological responses, whether willed or not, is to evoke the spirit and history of the 5th Amendment. Such situations call to mind the principle that the protection of the privilege 'is as broad as the mischief against which it seeks to guard'. Counselman vs. Hithcock, 142 U. S. 547, 562."

In the present case the Supreme Court of Georgia has not just approved physical responses to questions posed to a Defendant, but the imposition of psychological findings

as to sanity at the time of the acts charged based on the forced verbal statements of an accused. This is clearly against the 5th Amendment to the U. S. Constitution. In U. S. vs. Wade, 388 U. S. 218 the Court held:

> "The privilege against self-incrimination protects an accused only from being compelled to testify against himself or otherwise provide the State with evidence of a testimonial or communicative nature."

At the trial of this case the Trial Court allowed the State to put in evidence the testimony of one of the psychiatrists who had examined the Defendant for two hours during the Defendant's eight day stay at the State mental institution. The psychiatrist testified that based on all the examinations made, the Defendant was sane at the time of the commission of the alleged acts. See Appendix B, Pages 4-7) which contains the psychiatrists testimony. This testimony was presented to the jury during the State's case in chief and was part of the State's main case. At this point in the trial, the Defendant had tendered no evidence at all nor had he had the opportunity to do so. In fact during the guilty and innocence portion of the trial, the Defendant tendered no psychiatric testimony whatsoever.

This action by the Trial Court was approved by the Supreme Court of Georgia and is now a system that can be used by all prosecutors in Georgia.

Clearly therefore, the forced statements of the Defendant were used against him in violation of his constitutional rights. The psychiatrist said that the Defendant was sane at the time of the alleged acts and the only basis for this was the statements made by the Defendant to the psychiatrist when he was taken under Court order to the State Mental Institution for examination. Very clearly the Defendant was forced to testify against himself.

The Supreme Court of Georgia said that this procedure was alright because the actual statements of the accused were not testified to, only the results and opinions of the doctor resulting therefrom.

In U. S. vs. Avila, 227 F. Supp 3 the Court held:

> "'The fruit of the poisonous tree' doctrine is to the effect that an unlawful search taints not only the evidence obtained by the search but the facts discovered by the process initiated by the unlawful act."

In Davis vs. Mississippi, 394 U. S. 721, the Court held:

> "Illegally seized evidence is inadmissible at trial, however relevant and trustworthy the seized evidence may be as an item of proof."

In U. S. Vs. Castellana, 488 F 2d 65, the Court said:

> "Since we have found that Arwine's questions constituted unlawful custodial interrogation

and the handguns were the products of those questions, Castellana's statements and guns must be excluded from evidence."

Clearly therefore the initial intrusion into the Defendant's mind being illegal, the ultimate opinion derived therefrom is also inadmissible as evidence, being the result of the illegal act and being the fruit of the poisonous tree. The psychiatrist's testimony was definitely inadmissible.

Further it is to be noted that this evidence was used in the State's case in chief before the Defendant had a chance to speak, and in fact when the Defendant presented its defense there was no psychiatric testimony presented. The State did not use its psychiatrist as rebuttal to a defense raised by the Defendant but in the main setting out of its case. In the Supreme Court of Georgia there was a special concurrence which agreed that the Court ordered examination was unconstitutional but said the Defendant had a duty to say he was not going to use expert testimony of sanity to exclude the testimony.

The constitutionally guaranteed right to due process provides that the Defendant does not have to speak in his defense until the State has presented a prima facie case against him, and even then he does not have to speak at all. There is no duty on him to reveal his witnesses to the State prior to their testifying for him. Here the State placed the expert psychiatrist on the stand during their case in chief, and at a time when the Defendant could

not constitutionally be required to reveal its case. This was not rebuttal, as in fact, the witness would not have been competent to testify in rebuttal as the Defendant used no expert psychiatric testimony in its defense. Therefore, there was no duty on the Defendant to tell the State that he was not going to use such testimony at the time the State chose to use theirs. The procedure used and authorized in this case was therefore clearly unconstitutional.

The difficulties of this newly authorized procedure in Georgia, and its obvious illegality and unconstitutionality can be seen in the course of the cross-examination of the State's psychiatrist witness by Defendant's counsel. Appendix B, Page 58-65. The Trial Court took the position that the psychiatrist could give his opinions based on the entire record from the State Mental Institution including the reports of other persons who examined the accused. The Defendant's counsel sought to go into the results of these other examinations. The State objected, but the Trial Court overruled the objection and said the Defendant could go into them, but added the devastating provision that if Defendant did so he would allow the State to go into the actual statements of the accused and rule that Defendant had waived his rights in this regard. Clearly,

the Trial Court acknowledged that the statements of the accused used to form the basis of the sanity opinion were self-incriminating and a violation of the Defendant's constitutional rights. Under this ruling however, the Defendant was denied the fair and constitutional right of cross-examining the witness and his right to confront the witness, without waiving other of his constitutional rights. A Defendant's constitutional rights go hand in hand and should not be used in a manner antagonistic to each other as the Trial Court did here. Either the Defendant here gave up his right to confront the witness placed against him, or he gave up his right against self-incrimination. Under this new procedure set out by the Supreme Court of Georgia one of the rights of the accused have to be violated and therefore the whole procedure must be illegal and unconstitutional.

Therefore it is respectfully and earnestly submitted that the Supreme Court of Georgia in its opinion in this case have authorized Trial Courts to compel a Defendant to submit to a psychiatric examination and to allow into evidence the results thereof as to the sanity of an accused at the time of the commission of the alleged acts. This procedure being clearly violative of a Defendant's constitutionally protected rights against self-incrimination, it is submitted that this Court should issue its writ of

certiorari to the Supreme Court of Georgia to correct this serious and far reaching error and to rule that this procedure is illegal and unconstitutional and that the evidence produced at Trial in this case in this regard was illegally admitted and that a new trial should be granted.

2. Is it a violation of the Defendant's rights guaranteed under the 5th, 6th and 14th Amendments to the Constitution of the United States for the Supreme Court of Georgia to change the charges against the Defendant and convict him of crimes not charged in the indictment returned by the grand jury, not contained in the notice of aggravating circumstances served upon him by the District Attorney and not ruled upon by the trial jury and judge? Further, may the Supreme Court of Georgia change the indictment in such a manner as to use one act to make separate convictions of two different crimes?

The important question posed here is whether a Supreme Court or Appellate Court may change the charges against a Defendant and create convictions de novo. In this case, this is what the Supreme Court of Georgia has done and the Defendant contends that it is a violation of his 5th, 6th and 14th Amendment rights to be informed of the nature and cause of the charges against him before he faces a jury of his peers. It is submitted that what has occurred in this case can best be seen graphically.

44

CHARGES AND CONVICTIONS - SENTENCE

(a) IN TRIAL COURT AS INDICTED BY A GRAND JURY AND TRIED BY A JURY			(b) AS FOUND BY SUPREME COURT OF GEORGIA		
Murder	-	Death	Malice Murder	-	Death
Rape	-	Death	Statutory Rape	-	Resentence
Kidnapping with Bodily Injury, being aggravated sodomy	-	Death	Kidnapping with Bodily Injury, being forcible rape	-	Resentence
Simple Kidnapping	-	20 Years	Simple kidnapping	-	20 years

Therefore it is clear that the Defendant was indicted by the grand jury for kidnapping with bodily injury, being aggravated sodomy, tried before a jury and found guilty of this charge. The facts of this case being that the only injury to this victim was in the course of the one act of penetration - rape, and there being no bodily injury from the aggravated sodomy, the conviction for kidnapping with bodily injury, being aggravated sodomy could not stand and this was so held by the Supreme Court of Georgia in its opinion appealed from. Therefore, the conviction of the Defendant for kidnapping with bodily injury should have been reversed and the Defendant should have been acquitted of this charge. This the Supreme Court of Georgia did not do.

Because of the charge of the Trial Judge concerning the question of rape, the Defendant was convicted of statutory

rape rather than forcible rape, and the Supreme Court of Georgia affirmed a conviction of statutory rape. The Court went on to hold in its opinion:

> "The only evidence of bodily injury, to support the crime of kidnapping with bodily injury of the older child, is the bodily injury which resulted from the rape of that child - - - ."
>
> "As a consequence of the foregoing, there is evidence of bodily injury, not a part of the crime of statutory rape, to support the crime of kidnapping with bodily injury."

Therefore, the Supreme Court of Georgia acting as a court of first instance, indicted, tried and convicted the Defendant of kidnapping with bodily injury, being rape. This the Defendant was not charged with in the Trial Court.

The fact that the only injury to the older child was a tear to the vagina caused by the one act of penetration which was statutory rape will be discussed below.

The first point of great importance generally is whether a Supreme Court or highest State Appellate Court may change an indictment returned by a grand jury, or convict a Defendant for a crime with which he was not charged or convicted in the Trial Court. Obviously, if the Defendant

had been charged with rape and kidnapping with bodily injury, being rape, he would have filed the legal objections that will be discussed below. Clearly, he could not have been convicted of forcible rape and kidnapping with bodily injury, being rape as the Supreme Court of Georgia conceded. But the Defendant was never given the right to contest such charges as they did not exist until the Supreme Court of Georgia ruled.

The grand jury of Cobb County found that the kidnapping was with bodily injury because of the aggravated sodomy, not because of the rape, but the Supreme Court of Georgia changed this. It is respectfully submitted that the Supreme Court of Georgia has absolutely no power to do this and that it is a violation of a Defendant's constitutional rights under the 5th, 6th and 14th Amendments requiring due process of law and the right to be informed of the charges against him.

In Ex parte Bain, Jr., 121 U. S. 1 the Court held:

"When this indictment is filed with the Court, no change can be made in the body of the instrument by order of the Court, or by the prosecuting attorney, without a resubmission of the case to the grand jury. And the fact that the Court may deem the change immaterial, as striking out of surplus words, makes no difference. The instrument as thus changed, is no longer the indictment of the grand jury which presented it."

In U. S. vs. Krepper, 159 G 2d 958, the Court held:

"The indictment must accurately and clearly describe the offense and all ingredients of which the offense is composed."

"Federal Courts are without power to alter or amend indictments found by a grand jury and it is primarly the duty of the Court to throw a cloak of protection around the defendant as provided by the 5th Amendment requiring that infamous crimes be prosecuted only on presentment by a grand jury."

"When an indictment is filed with the Court, no change can be made in the body of the instrument by order of the Court, or by the prosecuting attorney, without a resubmission of the case to the grand jury."

In Stewart vs. U. S., 12 F 2d 524, the Court said:

"After the indictment was changed it was no longer the indictment of the grand jury who presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney; for, if it be once held that the changes can be made by the consent

or the order of the Court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the Constitution places upon the power of the Court, in regard to the prerequisite of an indictment, in reality no longer exists."

Clearly therefore, the Supreme Court of Georgia has violated the Defendant's right to indictment by a grand jury and notification of the charges against him. Not only has the Supreme Court of Georgia denied the Defendant the right to be indicted for kidnapping with bodily injury being rape, it has also denied the Defendant the right to a trial by jury on this charge. This is definitely a serious violation of the Defendant's constitutional rights and it is submitted that this Court should issue its writ of certiorari to the Supreme Court of Georgia informing it that it may not, in any case at all, act as a Court of initial jurisdiction and as a grand jury and convict the Defendant of crimes for which he was not indicted or tried in the Court below.

The Supreme Court of Georgia in its opinion on Motion for Rehearing said in effect that because the Defendant was charged in another count of the indictment with forcible rape, the Defendant had notice that he was

charged with kidnapping with bodily injury being rape. This is not the law and violates the Defendant's rights as argued above.

In Hood vs. U. S. 43 F 2d 353, the Court said:

"It is true that by appropriate reference allegations may be carried from one count to another but the reference should be sufficiently full in effect to incorporate the matter going before with that in the Court in which it is made."

"In determining the sufficiency of the indictment each count must be treated as a whole, and not merely as a part thereof."

"Each count is in form a distinct charge of a separate offense."

Therefore, the charge on kidnapping with bodily injury is a separate and distinct offense as if it were the only charge pending, and clearly the Supreme Court of Georgia has acquitted this Defendant as charged and found him guilty of a different crime with which he was not charged. This cannot be done as it violates the Defendant's constitutional rights and the Supreme Court of Georgia should be directed to correct this serious error.

The 5th Amendment to the U. S. Constitution states in part that:

"nor shall any person be subject for the same

offense to be twice put in jeopardy of life and limb."

In the present case, this is what has happened by the Supreme Court of Georgia finding the Defendant guilty of kidnapping with bodily injury being forcible rape. In the Trial Court the Defendant was charged with the separate offense of rape, both statutory and forcible rape. The jury verdict as affirmed by the Supreme Court is one for statutory rape and is therefore an acquittal as to forcible rape. However the Supreme Court of Georgia, ignoring the jury determination of no force, seeks to use that force as bodily injury to aggravate the kidnapping. This cannot be done and is a violation of the Defendant's constitutional rights. The Supreme Court of Georgia may not retry a Defendant and convict him of an act for which he has already been acquitted.

In Green vs. U. S., 355 U. S. 184, the Defendant had been tried for 1st degree murder and convicted for 2nd degree murder and the conviction for 2nd degree murder was reversed. It was held that he could not be retried for 1st degree murder.

> "Under the constitutional prohibition against double jeopardy a verdict of acquittal is final and is a bar to a subsequent prosecution for the same offense." See U. S. vs. Wilkins, 348 2d 844.

In Johnson vs. Estelle, 506 F 2d 347 the Court held:

> "Application of the rule that collateral estoppel is part of the 5th Amendment double jeopardy prohibition depends upon whether some issue necessary for the prosecution's case in the second trial has necessarily been found for the defendant in the first trial."

There the Defendant was found not guilty of burglary with intent to commit rape. In the second trial, he was charged with assault with intent to rape. It was held that double jeopardy attached because the first jury could have found no intention to commit rape on the first trial. The Court held:

> "When an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."
>
> "Where a determination of innocence on one of two issues was the cause of an acquittal and a determination of guilt on both issues is necessary for a subsequent conviction, the State is estopped from bringing the action."

Although in the present situation there have not been two trials, the Supreme Court of Georgia has in effect

tried and convicted the Defendant of crimes with which he was not tried in the Trial Court and for which double jeopardy has attached. The Supreme Court here found that the evidence of aggravated sodomy was not bodily injury and that the conviction for rape was one for statutory rape. If the case had been returned to the Trial Court for retrial, it is clear that the Defendant could not have been retried for kidnapping with bodily injury being forcible rape because of the previous jury determinate of statutory rape. Double jeopardy attached to any finding of forcible rape at the time of the finding of statutory rape.

Therefore, it is clear that the Supreme Court of Georgia has no power to change the Defendant's conviction for kidnapping with bodily injury to one where the bodily injury is forcible rape as double jeopardy had already attached on the finding of statutory rape.

Therefore it is submitted that this honorable Court should issue to the Supreme Court of Georgia ordering it to correct its error of finding the Defendant guilty of a crime, for part of which he had already been acquitted.

Further, under the constitution of the United States the same act may not be used to make two separate crimes and two separate convictions. In the present case there was but one act of penetration and the only injury occasioned was a tear to the vagina which occurred during that one act of penetration. Based on this one act causing the one injury,

the Defendant has been convicted and sentenced for statutory rape and kidnapping with bodily injury being forcible rape. Thus the single act of penetration has caused the Defendant to be convicted of two crimes. This is abhorrent to the constitutional provisions of the 5th and 14th Amendments.

In Ex Parte Nelson, 131 U. S. 176, the Court held that the Defendant could not be convicted of both bigamy and adultery arising out of the same act as a defendant may not be convicted of two crimes arising from one act.

In the Trial Court the State realized that because of this principle the Defendant could not be convicted of both aggravated sodomy and kidnapping with bodily injury being aggravated sodomy and therefore dismissed the aggravated sodomy count. If this case is returned to the Trial Court, it is clear that the Defendant may not be prosecuted for both statutory rape and kidnapping with bodily injury being forcible rape. Therefore, the Supreme Court of Georgia has no power to alter the Defendant's charges and convictions to find him guilty and punish him twice for one act.

All that has been said in this Section 2 is also applicable to the notice of aggravating circumstances which the State furnished the Defendant prior to trial and which stated the statutory aggravating circumstance that were charged to the jury under Georgia Code Section 27-2534.1.

One of these was that the jury could impose the death sentence if they found the offense of murder was committed while the Defendant was engaged in the commission of another capital felony, kidnapping with bodily injury being aggravated sodomy. The Supreme Court of Georgia affirmed the sentence of death for murder being aggravated by kidnapping with bodily injury being rape. Because of the reasons set out above, this sentence may not stand as it violates the Defendant's constitutionally guaranteed rights.

It is submitted that this section concerns the powers and rights of the Supreme Court of Georgia, as an appellate court to change the charges against a Defendant and has broad application. The Supreme Court of Georgia has set a precedent in this case whereby it may in the future find fact and alter and change the very crimes for which a Defendant stood trial and find a Defendant guilty of crimes for which he was not charged or tried. Also, it may do this even though other rights of a Defendant including double jeopardy and the right not to be convicted of two crimes for one act, may be violated. It is very clear that an Appellate Court of any State may not do this as it violates the most fundamental constitutional rights of any Defendant.

Therefore, it is submitted that this Honorable Court should issue its writ of certiorari to the Supreme Court of Georgia and require it to correct these very serious errors.

3. Is an appellate court bound by solemn admissions in judicio?

It is submitted that an appellate court is bound by solemn admissions in judicio and must render an opinion which follows these admissions and not one which ignores and goes contrary to these admissions.

In its brief to the Supreme Court of Georgia, The State of Georgia stated:

"The State concedes Enumeration of Error No. 4 is meritorious and that the verdict of guilty and sentence of death for kidnapping with bodily injury must be set aside since - - - kidnapping with bodily injury of Andrea Furlong, would be a lesser included offense of the felony murder of Count One." Appendix B, Pages 77-78.

> "Appellee has concluded earlier in this brief that the Defendant could be convicted of felony murder and not malice murder - - - (the) kidnapping with bodily harm - is merged with the count on felony murder." Appendix B, Page 79.

In conclusion, the State moved the Supreme Court of Georgia:

> "That the conviction of Felony Murder and the death sentence in Count One should be affirmed; - - - and that since Count Five (kidnapping with bodily injury) has merged in the felony murder conviction of Count One

56

that Count Five should be struck." See Appendix B, Page 81.

Therefore clearly and unequivocally, the State as prosecutor conceded, admitted and agreed that the Defendant could not be convicted of malice murder or kidnapping with bodily injury whatever the injury was, and it abandoned and withdrew the charges against the Defendant. The Supreme Court of Georgia ignored these solemn admissions in judicio and convicted the Defendant of malice murder and kidnapping with bodily injury anyway. It is submitted that this action by the Supreme Court of Georgia violated the Defendant's 5th and 14th Amendment rights of this Defendant. The State having admitted that the Defendant should be acquitted of malice murder and kidnapping with bodily injury and that these charges should be dismissed, these charges are then gone and dismissed forever. An appellate court cannot revive or create these charges as it violates the Defendant's rights to due process of law and his protection against double jeopardy.

As said in 29 Am Jur 2d §615.

"Judicial admissions are evidence against the party who made them including the prosecution in a criminal case and may constitute the basis of a verdict."

The Supreme Court of Georgia itself has recognized that admissions in judicio to the court in briefs and oral argument are binding upon it.

In Jones vs. Tressell, 221 Ga. 271, the appellant in its brief conceded that the judgment of the Trial Court was good, but alleged that the reasons for it were wrong. The Court held:

"The (Appellant's) acquiscence in the judgment of the Trial Court constitutes a waiver of the right to review that judgment."

In Butler vs. Lashley, 197 Ga. 461, the Court held:

"Counsel for the Plaintiffs in error, in their oral argument before this Court on the call of the case, having conceded that the attack made upon the will for lack of testamentary capacity was not supported by the evidence, that question will not be considered."

Clearly therefore, the Supreme Court of Georgia was bound by the admissions and concessions of the State. It is respectfully submitted that the Supreme Court of Georgia has set a dangerous precedent by refusing to follow the solemn admissions of the State and that this Court should issue its writ of certiorari to the Supreme Court of Georgia to correct this serious error and render an opinion consistent with the admissions of the State.

4. Is a promise by a detaining and arresting officer to tell the judge of a defendant's cooperation and to

give him a one man cell and psychiatric help, sufficient hope of benefit to a defendant to render any statements and confessions produced thereby inadmissible, being violative of a defendant's 5th and 14th Amendment rights.

It is undisputed in this case that on stopping the Defendant outside his residence, the Defendant initially would give the police officers no information. In an effort toobtain information, the police officer promised the Defendant he would tell the judge of the Defendant's cooperation. The police officer testified to this at the suppression hearing and it is contained in the "confession" of the Defendant. The police officer also told the Defendant he would see that he had a one man cell and a psychiatric examination. The officer also told the Defendant that he had a girl who could positively identify the Defendant.

Based on these promises and statements, the Defendant led the officers to the scene and showed them where he had left the younger child and later gave the officers two confessions, the second of which was suppressed by the Trial Court. It is clear from the record that the Defendant would not have done this except for these promises. At trial, the evidence of the Defendant leading the officers to the scene and what was found there, along with his first confession, were admitted into evidence for the jury to consider.

The Supreme Court of Georgia held, for the first time in Georgia, that a promise by a detaining and arresting

officer to tell the judge of a Defendant's cooperation did not hold out a slight hope of benefit to a defendant and therefore, the Defendant's acts and statements thereafter were admissible evidence. It is submitted that this is clearly contrary to the constitutional protections of a defendant and to the decisions of this Court. It opens the door, in Georgia, for officers to make promises to defendants to induce confessions on hope of lighter punishment, and have them admitted into evidence against those defendants.

In U. S. ex rel Everett vs. Murphy, 329 F 2d 68, the Court held:

> "A confession induced by police falsely promising assistance on a charge for less serious than the police knew would actually be brought is not to be considered a voluntary confession."

In Lego vs. Twomey, 404 U. S. 477, the Court said:

"The use of coerced confessions, whether true or false is forbidden because the method used to extract them offends consitutional principles."

In Jackson vs. Denno, 378 U. S. 368, the Court held:

"A defendant in a criminal case is deprived of due process of law if his conviction is founded in whole or in part upon an involuntary confession without regard for the truth or falsity of the confession and even though there is ample

evidence aside from the confession to support the conviction."

In Sorenson vs. U. S. 143 F 820, the police officer told the Defendant that he had an absolutely good case and that the Defendant should plead guilty and throw himself on the mercy of the Court. The resulting confession was held not to have been voluntarily made.

In the present case the Defendant was told that there was a positive identification of the Defendant and that the police officer would tell the judge of Defendant's cooperation. Therefore, in the present case, the acts and statements of the accused were not voluntary and should be suppressed.

In Sorenson vs. U. S. (supra) the Court said;

"And as the human mind under the pressure of calamity is easily seduced and liable, in the alarm of danger, to acknowledge indiscriminantly a falsehood or a truth, as different agitations may prevail, a confession, whether made upon an official examination or in discourse with private persons, which is obtained from a defendant, either by flattery of hope, or by the impressions of fear, however slightly the emotions may be implanted, is not admissible evidence; for the law will not suffer a prisoner to be made the deluded instrument of his own conviction."

61

It is clear in the present case that the Defendant has been the deluded instrument of his own conviction. The following language can be seen in the written confession of the Defendant that at the time of the initial stop:

"Det. Williams - You denied it for a while before you decided to help us out, right?

Defendant - Right, and the reason I decided to help you out was because you said you - - -

Det. Williams - Would tell the Judge that you showed us where everything occurred.

Defendant - Right.

Det. Williams - And I will do that, okay."

Appendix B, Pages 74-76

It is clear from this and the entire recorded statement that the Defendant, at the time of the initial stop would not have said anything at all except for the promises of hope made to the Defendant and the promise to tell the judge. A promise to inform the judge of the cooperation of a defendant in any case, gives the Defendant a hope and promise of lighter punishment and therefore such a statement cannot be voluntarily made, and should be suppressed.

Therefore, it is submitted that the Supreme Court of Georgia has seriously erred in establishing in Georgia that a police officer may induce a confession by promising a

62

Defendant that he will tell the judge of the defendant's cooperation and thereby induce the hope of lighter punishment and that the resulting statements and confessions will be admissible. It is submitted that this honorable court should issue its writ of certiorari to the Supreme Court of Georgia to correct this serious and far reaching error.

5. The death sentence in Georgia is violative of the 5th, 8th and 14th Amendments to the United States Constitution.

In the present case, the Defendant raised this issue in the Trial Court. See Appendix B, Page 8 and throughout each state of the case and appeal and the Supreme Court of Georgia has failed to rule on it although they were specifically requested to do so on Motion for Rehearing. See Appendix B, Page 82. The Defendant contends that the death sentence is not equally applied and that more serious criminal intentions receive lighter punishment and lack of criminal intention may result in the death sentence.

Although the Defendant is aware that in the recent past, the death sentence as presently enacted in Georgia, has been approved by this Court, this Court has ruled certain provisions of the Georgia statute unconstitutional, stating that the death sentence may not be imposed for rape or kidnapping with bodily injury - Coker vs. Georgia, 433 U. S. _____(1977)

and Eberhardt vs. Georgia, U. S. No. 74-5174. These decisions themselves show that the death sentence is in fact cruel and unusual punishment and that defendants are not equally treated. In Furman vs. Georgia, _____U. S. _____(1973), the Supreme Court held as one reason for reversing the death penalty in existence at that time, that the death sentence was not equally applied.

Under the present situation, the death sentence may be imposed for felony murder where there is no malice and no premeditation. If the death occurs during the course of any felony - even forgery or the sale of a controlled substance - the death penalty can be imposed, even if no harm was intended. However, the most tortuous rape and kidnapping can occur with maiming for life, and no death sentence can occur. If, in McCorquodale vs. State, 233 Ga. 369, the Defendant had accomplished all his many acts of torture and depravity, with their psychologically and physically damaging permanence for the life expectancy of a 17 year old, and he had not made the final act of strangulation, which is a very possible circumstance under those facts - no possible death sentence could have stood.

Clearly, this is not equal justice under the law. One second of misthought can result in a death sentence but days of planning and further days of torture and torment of a victim can only result in a life sentence. Therefore ,

the death sentence as presently in existence in Georgia does not reserve the death sentence for the most serious crimes and most flagrant criminals, but Defendant of lesser intent and act may be subject to the death sentence.

The death sentence as it presently exists in Georgia is not constitutional, as there is not an equal protection under the law for all citizens, and potential defendants of this State, but is cruel and inhuman punishment and unevenly imposed on the population.

Therefore, it is submitted that this Honorable Court issue its writ of certiorari to the Supreme Court of Georgia requiring it to declare the death sentence as it presently exists in Georgia, unconstitutional.

SUMMARY

The Petitioner submits that there are serious errors in this case of a constitutional nature and of great magnitude which it is necessary to correct. While the facts of this case are clear and without dispute, except on the issue of murder, the legal proceedings in this case have become highly complex and the attempt by the Supreme Court of Georgia to straighten the matter out has caused more confusion and far reaching illegal and unconstitutional rulings by that body. The Defendant has attempted to remain as concise as possible but under the intricacies of the legal steps

The Defendant's petition has become rather long. It is submitted that a full explanatuon of the charges, convictions and ruling of the Supreme Court of Georgia was necessary to clearly show the serious errors in this matter.

CONCLUSION

It is respectfully submitted that this Court should grant petitioner's petition for writ of certiorari and issue a writ of certiorari to the Supreme Court of Georgia requiring it to rule: -

a) That a Trial Court may not order a psychiatric examination of a defendant as to his sanity at the time of the commission of the alleged offenses for which he is on trial, and may not allow the State to use the resulting opinions as evidence in its case in chief, and a new trial in this case should therefore be required.

b) That the changing of the offenses charged against an accused and convicting a defendant of crimes of which he was not tried, by the Supreme Court of Georgia, is error and that therefore, the conviction of this defendant for kidnapping with bodily injury being aggravated sodomy should be reversed and the death sentence for murder aggravated by kidnapping with bodily injury being aggravated sodomy should be set aside.

c) That the Supreme Court of Georgia is bound by the admissions in judicio of the State, and that therefore the convictions of this Defendant for kidnapping with bodily injury and malice murder should be set aside.

d) That the promise of a police officer to tell the judge of the cooperation of a defendant is such hope of benefit as to make resulting statements and confessions involuntary and not admissible in evidence against a defendant, and therefore, in this, case to order a new trial.

e) That the death penalty in Georgia is unconstitutional as not being equally applied and therefore, the death sentence in this case should be set aside.

Respectfully submitted,

GRUBBS & GRUBBS

BY: _____
Attorney for Petitioner

BY: _____
Attorney for Petitioner

P. O. Box 1149
271 Roswell Street
Marietta, Georgia, 30061
Phone: 422-3200 (404)

WILLIAM P. HOLLEY, JR.

BY: _____
Attorney for Petitioner

223 Washington Avenue, N. E.
Marietta, Georgia
Phone: 422-3131 (404)